United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-7168

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P/S

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FOR THE SECOND CIRCUIT

FRANK SANTOS, CARL GUERRIERRI, and MARIO VOZZO, each of them individually and on behalf of all other persons, members of local unions affiliated with Painters' District Council # 9 of New York City and the International Brotherhood of Painters and Allied Trades, employed or seeking employment as woodwork finishers within New York City, similarly situated,

Appellants,

—*v.*—

DISTRICT COUNCIL OF NEW YORK CITY AND VICINITY OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Summary

This Reply Brief is confined to two matters. First, it draws attention to the decision of this Court, handed down June 18, 1976 (six days after Appellants' (Santos') main brief was filed) in Drywall Tapers and Pointers, etc. and Charles Long, et al., individually, etc. v. Operative Plasterers and Cement Masons, etc., et al., ___ F.2d ____, 92 LRRM 3203, Slip Op. No. 1075, Docket No. 76-7108. Second, it responds to an argument that Carpenters' brief seeks to

derive from two NLRB decisions in proceedings brought by the Painters' Union.

POINT I.

AS DRYWALL TAPERS MAKES CLEAR, AN AGREEMENT NEGOTIATED BETWEEN INTERNATIONAL UNIONS TO RESOLVE WORK ASSIGNMENTS IS ENFORCEABLE UNDER SECTION 301(a) AND INDIVIDUAL MEMBERS OF ONE OF THE UNIONS HAVE STANDING TO ENFORCE IT.

In Drywall Tapers, supra, an agreement had been entered into between three international unions, the Plasterers, the Painters and the Bricklayers. A local union of Painters, and five of its members (the latter suing on behalf of the class of its members whose work province was established by the agreement), brought suit against Plasterers (and three of its locals) to enforce the agreement. This Court held that the agreement was enforceable in federal court under Section 301(a) of the Labor-Management Relations Act of 1947, 29 USC 185(a), and, in discussing the unlimited geographical scope of the order entered by the district court, upheld the right of individual members to enforce such an agreement on behalf of the entire class of members who might be deprived of their rightful work province by the alleged violations.

The Appellants (Santos) have already stressed these two points at pages 14 to 22 of the Santos brief. All that will be added here is the teaching of Drywall Tapers on these two matters.

The agreement on which suit in Drywall Tapers was brought was subject to an arbitration structure plainly designed to prevent jurisdictional disputes from ever reaching the courts (Slip

Op. page 4232, 92 LRRM at 3204). Nevertheless, this Court held that the agreement was enforceable under Section 301(a) (Slip Op. page 4234, 92 LRRM at 3205):

> "The initial issue for our consideration is whether the Memorandum contested here comes within the terms of § 301(a) of the LMRA, which vests jurisdiction in the district courts for suits alleging 'violation of contracts ... between an ... labor organizations /representing employees in an industry affecting commerce/.' It is well established that § 301(a) comprehends 'other labor contracts besides collective bargaining' agreements. Retail Clerks v. Lion Dry Goods, 369 U.S. 17, 26 (1962) (strike settlement agreement). See also, Abrams v. Carrier Corporation, 434 F.2d 1234 (2 Cir. 1970), cert. denied sub nom. United Steelworkers of America, AFL-CIO v. Abrams, 401 U.S. 1009 (1971) (union charter and bylaws); Local 33, Int. Hod Carriers, etc. v. Mason Tendrs, etc., 291 F.2d 496 (2 Cir. 1961) (longstanding custom and practice); Parks v. International Brotherhood of Electrical Wkrs., 314 F.2d 886 (4 Cir.), cert. denied, 372 U.S. 976 (1962) (constitution of international union); International Brotherhood of Firemen and Oilers v. International Ass'n of Machinists, 338 F.2d 176 (5 Cir. 1964) (no-raid agreement); United Textile Workers v. Textile Workers Union, 258 F.2d 743 (7 Cir. 1958) (no-raid agreement). Enforcing freely negotiated contracts between labor orgnizations both minimizes disruption of interstate commerce and encourages the voluntary resolution of inter-union disputes. We hold that the Memorandum in question here clearly falls within the literal terms and policy objectives of § 301(a). It is an agreement of definite content negotiated by two international unions to resolve work assignments within the construction industry in an effort to prevent labor warfare."

Plainly, what was said in Drywall Tapers applies with equal force here. Since that point has been set out in pages 14 to 19 of Appellants' (Santos') brief, it need not be repeated here. Attention may be drawn, however, to the citation above of Abrams v. Carrier Corporation, supra, in view of the attempt by Appellee (Carpenters) to put a different interpretation on that case (compare: pages 18-19, 24-26 of Carpenters' brief).

This Court's decision in Drywall Tapers, supra, likewise disposes of the second argument presented by Carpenters in their brief (pages 24-26), namely their challenge to the standing of Santos, et al., to enforce a jurisdictional agreement entered into between international unions. In Drywall Tapers, the plaintiffs were a local union and five of its members, the latter situated as Santos is here and claiming a similar class representation. The district court, on plaintiffs' motion, had entered an order of unlimited geographical scope, enjoining defendants from performing the work in question at any jobsite "wheresoever located." This Court upheld the scope of the order by pointing to the standing of the five members, as representatives of the class, to seek such relief (Drywall Tapers, supra, Slip Op. page 4240, 92 LRRM at 3207);

> "Since this action has been brought on behalf of the class of all painters who might be deprived of their rightful work province, the district court acted within its proper discretion in entering such a broad order."

POINT II.

NEITHER OF THE N.L.R.B. DECISIONS CITED BY CARPENTERS HAS ANY BEARING ON THIS CASE.

Carpenters argued below (J.A. 31a-32a, 34a-36a, 38a-39a) that one or the other of two proceedings in the NLRB (the "ULP Case" and the "UC Case") either superseded or otherwise invalidated the arbitration decision of Impartial Umpire Cole which had found Carpenters to have violated Section 3 of Article XX of the AFL-CIO Constitution. The district court did not pass

on that argument (J.A. 63a), hence it has no place in connection with the instant appeal. Nevertheless, Carpenters stress the two NLRB decisions in their brief (pages 4-6, 9, and 20) to suggest that they provide some basis for affirmance. Carpenters' contention is misguided, however, for two reasons: first, because the issue of the NLRB proceedings is nothing but a red herring so far as this appeal proceeding is concerned; and second, because neither of the two NLRB decisions has any bearing on this case at all.

The first of the two NLRB proceedings (the "ULP Case") was brought as an unfair labor practice charge by the Painters' Union against an employers' association. The Painters' Union charged that the employers had unlawfully assisted the Carpenters. The Trial Examiner upheld the charge but the NLRB reversed, noting that the bargaining history was chaotic and that under the circumstances the employers could not be found to have acted illegally by dealing with Carpenters, regardless of whether Carpenters was or was not entitled to represent the woodfinishing employees along with cabinetmaking employees. The Board was careful not to make any determination as to what union was the rightful representative of woodfinishers; it merely found that, under the circumstances, the employers had not acted illegally. (cf.: quotations from the Board's decision given by Olsen, Carpenters' president, at J.A. 38a-39a).

The second proceeding (the "UC Case") involved a petition for unit clarification brought by Painters. The Board dismissed the petition on the ground that it raised a jurisdictional ques-

tion (J.A. 36a):

> "... the instant petition raises a question concerning representation which cannot be resolved in the proceeding now before us. Accordingly, we shall dismiss the petition."

Thus the NLRB did not, in either of the two proceedings, make any determination as to jurisdiction: neither as to the right of either union to represent employees, nor as to the right of members of either to work assignment. Indeed, as to work assignment, it would be bound to defer to any agreement between the labor organizations providing for settlement of such disputes -- such as Section 3 of Article XX of the AFL-CIO Constitution; cf. Section 10(k) of the National Labor Relations Act, as amended, 29 USC 160(k); Carey v. Westinghouse, 375 U.S. 261, 266 (1964); Local 33, Int. Hod Carriers, etc. v. Mason Tenders, 291 F.2d 496, 504-504 (2 Cir. 1961).

It follows that neither of the two NLRB proceedings has any bearing on any aspect of this case: neither on this appeal nor on any determination of the merits below.

CONCLUSION

For the foregoing reasons, and those set forth in the Appellants' (Santos') main brief, the decision of the district court should be reversed and the cause remanded.

Respectfully submitted,

BURTON H. HALL
Attorney for Appellants

United States Court of Appeals

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles J. Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 12 State Street, valley Stream, New York

That on August 2, 1976, he served 3 copies of Replya Brief

on

Breed abbott & Morgan
One Chase manhattan Plaza
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Charles J. Esposito

Sworn to before me this
2nd day of August, 1976

John V. Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977